THE BALLER HERBST LAW GROUP

A PROFESSIONAL CORPORATION
1820 JEFFERSON PLACE, N.W.
SUITE 200
WASHINGTON, D.C. 20036
(202) 833-5300
FAX: (202) 833-1180

WRITERS DIRECT DIAL:
(202) 833-1144

INTERNET ADDRESS:
Jim@Baller.com

June 1, 1999

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals
445 Twelfth Street
Eighth Floor
Washington, D.C., 20554

re: Notice of *Ex parte* Communications in Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri, *CC Docket No. 98-122*

Dear Secretary Salas:

On May 27-28, 1999, Jane Cirrincione and Richard Geltman of the American Public Power Association (APPA) and James Baller, legal counsel to the Missouri Municipals and APPA in the Missouri preemption proceeding, participated in *ex parte* meetings with Christopher Wright, the General Counsel of the Commission, and James Carr, Suzanne Tetreault and Aliza Katz of the Office of General Counsel, and with Kevin Martin, Legal Advisor to Commissioner Furchtgott-Roth. The meetings occurred at the Commission's offices at the Portals.

During the meetings, representatives of the APPA and the Missouri Municipals made the following points:

- Public power utilities have for decades played a critical role in bringing competition to their communities in the electric power industry and can play a similar role in telecommunications. Currently, public power utilities are providing a range of communications services in 33 states that do not have barriers to entry. In 8 states, however, barriers to municipal entry have emerged, and several other states are considering similar measures.

- The need of public power utilities to be able to provide telecommunications services free of barriers to entry affects not only the telecommunications industry but also the electric power industry. Congress and the states are striving to maintain a competitive balance

between the public and private sectors. As privately-owned electric utilities move into telecommunications, state barriers that inhibit the ability of public power utilities to offer similar services could decisively tip this competitive balance in favor of the private sector, contrary to Congress's intent.

- The Missouri case differs from the *Abilene* case because in the latter, both the Commission and the D.C. Circuit Court of Appeals expressly declined to rule on whether the term "any entity" in Section 253 of the Telecommunications Act applies to public power utilities. The Missouri preemption proceeding squarely presents and emphasizes this issue.

- In the *Abilene* case, the Commission acknowledged that it had not considered the legislative history of Section 253 in issuing the *Texas Order*, because it believed that this history applied only to public power utilities and not to municipalities, such as Abilene, that do not operate their own electric utilities. The Commission also acknowledged that the legislative history S.1822 in the 103rd Congress, from which the 104th Congress took the operative language Section 253(a) verbatim, is relevant to whether Congress intended the term "any entity" in Section 253(a) to apply to public power utilities.

- At oral argument in the *Abilene* case, counsel for the Commission urged the Court not to consider the rights of public power utilities or the legislative history of Section 253, promising that these issues would be addressed fully and fairly in the Missouri preemption proceeding. In response, the D.C. Circuit did not consider the legislative history, finding that it applies only to public power utilities, whose rights were not before the Court.

- The legislative history on its face supports federal preemption of state barriers to entry by public power utilities, to which Congress referred repeatedly in the report on S.1822. These references are all the more meaningful because they were responsive to APPA's and UTC's lobbying efforts, as summarized in APPA's testimony on the bill. That testimony, given by Billy Ray of Glasgow, Kentucky, is included in the Missouri record. Through APPA's and UTC's efforts, Congress was well aware of the significant role that public power utilities could play in developing the National Information Infrastructure, as it was called at the time, and the definitions and preemption provisions of S.1822, which were carried into the Telecommunications Act, reflected Congress's intent to encourage as many public power utilities as possible to become involved in that effort.

- In summary, even if the Commission and the D.C. Circuit were correct in concluding that Congress's intent was not clear with respect to municipalities that do not operate electric utilities, Congress's intent as to public power utilities was unmistakable. Given the paramount importance of congressional intent in preemption analysis, this should lead to a different result in the Missouri case than the one the Commission reached in the Texas case.

- While it is true that subsequent letters from members of Congress do not carry as much weight as contemporaneous statements in official reports that accompany legislation, Congressman Dan Schaeffer's letter to Chairman Reed Hundt dated August 5, 1996, is entitled to special weight. Rep. Schaefer was the author of the statement in the Joint Committee Report accompanying the Telecommunications Act that "explicit prohibitions on entry by a utility into telecommunications are preempted under this section." That contemporaneous, official statement did not distinguish between privately and publicly owned electric utilities, and Rep. Schaefer's letter merely confirmed that no such distinction was intended.

- In summary, even if the Commission and the D.C. Circuit were correct in concluding that Congress's intent was not clear with respect to municipalities that do not operate electric utilities, Congress's intent as to public power utilities was unmistakable. Given the paramount importance of congressional intent in preemption analysis, this should lead to a different result in the Missouri case than the one the Commission reached in the Texas case.

- From a policy standpoint, involvement in telecommunications by public power utilities is highly desirable, and in many communities, essential. Where barriers to their entry do not exist, public power utilities are developing broadband networks that are achieving the pro-competitive purposes of the Telecommunications Act.

- The need for a prompt decision in the Missouri Municipals' favor is also underscored by the Commission's report to Congress under Section 706 of the Telecommunications Act concerning the deployment of advanced telecommunications capabilities. In the Report, the Commission assumed that such deployment will occur at a prompt and reasonable pace, in part because public power utilities will participate in the deployment. At the same time, in his accompanying statement, Chairman Kennard expresses concern that "geometric disparities" between urban and rural communities may arise in the very near future. If such disparities do occur, in part because of state barriers to municipal entry, the rationale of the *Texas Order* and the *Abilene* decision would leave the Commission helpless to do anything about them.

- In numerous states, incumbents have urged legislators to ignore the Commission's *dictum* in the *Texas Order* that other states should not do what Texas has done. Instead, they have focused on the Commission's *holding* that it is powerless to prevent states from enacting measures that further entrench local monopolies. Some incumbents have even gone so far as to claim that the *Texas Order* shows that the Commission believes that the private sector is fully capable of meeting the Nation's needs for telecommunications services. The incumbents will surely redouble their anti-competitive efforts if the Commission rejects the Missouri preemption petition.

At both meetings, representatives of APPA and the Missouri Municipals distributed copies of the materials appended hereto.

Sincerely,

Jim Baller

James Baller

Enclosures

cc: Attached Lists

CERTIFICATE OF SERVICE

I, James Baller, hereby certify that on this 1st day of June 1999, I caused copies of the foregoing letter to be served on the parties on the attached Service List by first-class U.S. Mail.

By U.S. Mail:

Honorable William E. Kennard, Chairman
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Honorable Susan Ness, Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Honorable Harold W. Furchtgott-Roth,
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Honorable Michael K. Powell, Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Honorable Gloria Tristani, Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Thomas Powers
Legal Advisor to Commissioner Kennard
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Anita Walgren
Legal Advisor to Commissioner Ness
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

ITS, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

Paul Misener
Legal Advisor to
Commissioner Furchtgott-Roth-F.C.C.
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Kyle Dixon
Legal Advisor to Commissioner Powell
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Sarah Whitesell
Legal Advisor to Commissioner Tristani
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Christopher J. Wright, General Counsel
James Carr
Suzanne Tetrault
Alica Katz
Office of the General Counsel
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Ms. Kathryn Brown, Chief of Staff
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Janice M. Myles
Federal Communications Commission
Common Carrier Bureau, Room 544
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Kecia Boney
R. Dale Dixon, Jr.
Lisa Smith
Jodie Kelly
MCI Telecommunications Corporation
1801 Pennsylvania Avenue
Washington, D.C. 20006

L. Marie Guillory
Jill Canfield
National Telephone Cooperative Association
2626 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

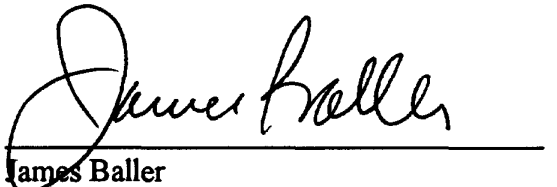
Michael K. Kellogg
Geoffrey M. Klineberg
Paul G. Lane
Durward D. Dupre
Michael J. Zpevak
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005

Jeffrey L. Sheldon
UTC, The Telecommunications Association
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036

Gail L. Polivy
John F. Rapoza
GTE Service Corporation
1850 M Street, N.W., Suite 1200
Washington, D.C. 20036

Jeremiah W. (Jay) Nixon
Ronald Molteni
Office of the Attorney General
Supreme Court Building
P.O. Box 899
207 W. High Street
Jefferson City, MO 65102

Carol Mattey, Cheif
Margaret Egler
Claudia Pabo
Policy Division
Common Carrier Bureau
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554



James Baller
Sean A. Stokes
Lana L. Meller
THE BALLER HERBST LAW GROUP, P.C.
1820 Jefferson Place, N.W.
Suite 200
Washington, D.C. 20036
(202) 833-5300 (phone)
(202)833-1180 (fax)
jim@baller.com (Internet)

Attorneys for the
Missouri Municipals

June 1, 1999

ATTACHMENT A

American Public Power Association

2301 M Street, N.W.
Washington, D.C. 20037-1484
202/467-2900
202/467-2910

Status of Existing State Legislative/Regulatory Barriers to Entry for Municipal Utilities in Telecommunications

1) ***Texas***—bars provision of all telecommunications services, directly or indirectly, by municipalities and municipal utilities.

2) ***Arkansas***—bars provision of telephone exchange service by municipalities and municipal utilities.

3) ***Missouri***—bars provision of all telecommunications services or facilities except services for internal utility use, emergency services, health and education services and Internet services by municipalities and municipal utilities.

4) ***Tennessee***—bars provision of cable television, security, paging and Internet services by municipalities and municipal utilities.

5) ***Nevada***—bars provision of all telecommunications services by municipalities and municipal utilities.

6) ***Minnesota***—requires 65% majority of voters to approve provision of telecommunications services.

7) ***Florida***—imposes various taxes to increase prices for municipalities and municipal utilities.

8) ***Virginia***—bars sale or lease of telecommunications services, sale or lease of equipment, and lease of infrastructure by municipalities and municipal utilities, but would allow sale of municipal telecommunications infrastructure in place by September 1, 1998.

Public service commissions have issued adverse case-specific rulings in the State of Nebraska and the State of Georgia.

ATTACHMENT B

DAN SCHAEFER
6TH DISTRICT, COLORADO

2353 RAYBURN BUILDING
WASHINGTON, D.C. 20515
(202) 225-7882

3615 SOUTH HURON STREET, #101
ENGLEWOOD, COLORADO 80110
(303) 762-0650
FAX: (303) 762-0679

COMMITTEE ON COMMERCE
SUBCOMMITTEE:
ENERGY AND POWER
CHAIRMAN
TELECOMMUNICATIONS AND FINANCE

COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE:
EDUCATION, TRAINING, EMPLOYMENT
AND HOUSING

Congress of the United States
House of Representatives
Washington, D.C.

August 5, 1996

The Honorable Reed H. Hundt
Chairman
Federal Communications Commision
1919 M Street N.W.
Washington, D.C. 20554

Re: CC Docket No. 96-98 and CCBPol 96-14

Dear Chairman Hundt:

One of the fundamentals of free market competition is the ability of firms to enter a business easily and rapidly. It is for that reason that we include a provision in the Telecommunications Act of 1996 -- section 253(a) -- prohibiting state or local governments from imposing barriers to the provision of telecommunications service by any entity. The Commission is considering the implementation of this section in numerous proceedings, including the major docket implementing sections 251 and 252 (CC Docket No. 96-98) and the proceeding considering the preemption of the Texas telecommunications law (CCBPol 96-14).

It is especially important for the Commission to note the fact that section 253(a) prohibits the imposition of barriers on "any entity". In other words, state and local governments are prohibited from adopting laws or regulations that permit some entities to enter the market while excluding others. Such discrimination is simply unlawful.

More specifically, it is clear from the report language in the Conference Agreement that Congress recognized that utilities may play a major role in the development of facilities-based local telecommunications competition and that any prohibition on their provision of service should be preempted. This language states: "[E]xplicit prohibitions on entry by a utility into telecommunications are preempted under this section." The Commission thus must reject any state or local action that prohibits entry into the telecommunications business by any utility, regardless of the form of ownership or control. In addition, the Commission should ensure its interconnection and access regulations treat utilities the same as other entities.

Thank you for your attention to this matter. We look forward to hearing from you and seeing the Commission's decisions implementing this critical provision.

Sincerely,

DAN SCHAEFER
Member of Congress

ATTACHMENT C

Issue Brief

American Public Power Association
2301 M St. N.W.
Washington, D.C. 20037-1484
202/467-2900

Overcoming Anticompetitive State Barriers to Entry for Municipal Utilities in Telecommunications

April 1999

Summary: For more than a century, public power utilities have played a vital role in furnishing essential local competition in the electric power industry. This competition has kept prices low and quality of electric service high in the communities that operate their own electric utilities. In the absence of barriers to entry, public power utilities can now play a similar role in telecommunications.

Clearly, in enacting the Telecommunications Act of 1996, Congress envisioned that utilities – with their existing internal communications infrastructure – could help to further the goals of competition by providing an alternative means through which new competitive communications services could be offered.

Yet, in an effort to undermine this objective, existing cable TV and local telephone interests are working to prevent municipal utilities from providing telecommunications services within their own communities. In fact, it is clear that cable and local telephone companies are utilizing their vast resources and long-standing relationships with state legislatures to inhibit the development of competition at the state level. In an effort to achieve in the states what they could not obtain at the federal level, they have pushed legislation in eight states to create barriers to entry for municipal utilities in telecommunications. In fact, they have undertaken a coordinated nationwide strategy to undermine the Act in this area – as evidenced by the same anticompetitive legislation being introduced by cable companies in Georgia and Oregon, for example. This unfortunate trend is expected to grow – unless Congress and the FCC make it clear that such statutes are out of step with the intent and language of the Telecommunications Act of 1996.

The FCC has recently been presented with such an opportunity. Several municipalities in the State of Missouri have jointly asked the FCC to override a Missouri State statute which conflicts with the Telecommunications Act by prohibiting the provision of most telecommunications services by municipalities and municipal utilities. A plain reading of the language of the Telecommunications Act, and accompanying report language related to utilities in particular, makes it very clear that this barrier to entry must be nullified. A strong preemptive FCC ruling in this case will effectively bring an end to this ongoing effort to frustrate the goals of the Telecommunications Act of 1996 through enactment of restrictive state statutes – and will reinstate the long tradition of local control that has been the driving principle behind municipal utilities since the inception of the electric industry over a century ago.

Regulatory/Legislative Background Regarding State Barriers to Entry for Municipal Utilities in Telecommunications: In the Telecommunications Act of 1996, Congress sought to open the telecommunications marketplace to all potential competitors, including electric utilities without qualification. To ensure that those interests with existing market control over various aspects of the telecommunications industry would not be able to undermine the Act's pro-competitive policies at the state and local level, Congress included the following language in Section 253(a) of the Act:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service.

In enacting Section 253(a), Congress was well aware of the vital role that public power utilities could play in bringing competition to telecommunications markets, and took steps to include explicit language in the Act's conference committee agreement that reaffirmed the drafters' intention that all utilities be free from state barriers to entry. *The Conference Committee Agreement specifically noted the conferees' clear understanding that "electric, gas, water or steam utilities" might "choose to provide telecommunications services," and they confirmed their understanding and intent that "explicit prohibitions on entry by a utility into telecommunications are preempted under this section [§ 253(a)]." Several recent letters to the FCC from Congress have reaffirmed that this provision was designed to ensure electric utility involvement in the provision of telecommunications services.*

The petition that has been filed by the Missouri municipals asks the FCC to closely examine this legislative history which supports the involvement of municipal utilities in telecommunications. Senator Trent Lott (R-MS) commented upon passage of the Act that its goal is to "construct a framework where everybody can compete everywhere in everything". To fully achieve this objective, the FCC must take action to eliminate any state-enacted barriers to entry for any potential competitor.

How State Barriers to Entry for Municipal Utilities in Telecommunications Hurt Communities and Consumers: The vast majority of public power utilities in the U.S. are located in cities with less than 10,000 residents. In fact, municipal electric utilities developed largely due to the failure of private utilities to provide electrical service in many rural areas because they were viewed as unprofitable. In these cases, communities formed municipal electric utilities to do for themselves what they viewed to be of vital importance to their quality of life and future economic prosperity. Once again, public power utilities are well-positioned to bring the infrastructure of the future to their communities by helping to facilitate the development of competition in the telecommunications industry, and the offering of new services in the very areas that may not receive them otherwise. Ultimately, preventing municipal utilities from providing telecommunications services within their own communities will not only inhibit competition in telecommunications, but it will also unfairly limit the telecommunications services available to rural residents, and impede economic development and growth in numerous rural communities throughout the country.

Moreover, this debate is not strictly related to competition between public and private sectors – despite the local telephone and cable TV companies' efforts to cast the issue in that light. In fact, a large percentage of municipal utilities are planning to provide communications services

through partnerships with private companies, or by outsourcing the provision of these services entirely. It is here that many new market entrants will have the opportunity to bring enhanced competition to many communities. If those who currently control local telephone and cable services are able to successfully inhibit the ability of municipal utilities to provide the means for these new market entrants to provide competitive services, customers will be left with less choice and higher costs. If the goal of Congress and the FCC is to ensure that the benefits of competition flow to consumers– it is clear that municipal utility involvement in telecommunications can only help to achieve and further this end.

Finally, it is important to note that municipal utilities are directly accountable to the communities they serve. Thus, the decisions made by locally-owned utilities reflect the needs and demands of their citizens. Given the importance of telecommunications infrastructure and services to the future of our nation's communities, it is vital that the principle of local control is not eroded by the efforts of the large regional incumbent monopolies who are arguing to take these decisions out of the hands of communities and their locally-elected officials.

APPA Position: The FCC, in implementing the Telecommunications Act of 1996, should resolve all questions of interpretation in ways that would permit and encourage public power systems to become fully engaged in providing telecommunications services or in facilitating the provision of such services by others.

ATTACHMENT D

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
The Missouri Municipal League;	)	
The Missouri Association of Municipal Utilities;	)	
City Utilities of Springfield;	)	
City of Columbia Water & Light;	)	CCBPol 98 - _____
City of Sikeston Board of Utilities.	)	
	)	
Petition for Preemption of	)	
Section 392.410(7) of the	)	
Revised Statutes of Missouri	)	
	)	

PETITION FOR PREEMPTION

James Baller
Lana L. Meller
Cheryl Flax-Davidson
THE BALLER LAW GROUP, P.C.
1820 Jefferson Place, N.W.
Suite 200
Washington, D.C. 20036
(202) 833-5300 (phone)
(202) 833-1180 (fax)
jimb@baller.com (Internet)

Attorneys for the
Missouri Municipals

July 8, 1998

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
The Missouri Municipal League;	)	
The Missouri Association of Municipal Utilities;	)	
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City of Columbia Water & Light;	)	CCBPol 98 - _____
City of Sikeston Board of Utilities.	)	
	)	
Petition for Preemption of	)	
Section 392.410(7) of the	)	
Revised Statutes of Missouri	)	
	)	

To the Commission:

PETITION FOR PREEMPTION

Pursuant to Section 253 of the Telecommunication Act of 1996, the Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and the Sikeston Board of Utilities (collectively "the Missouri Municipals") petition the Commission for an order preempting Section 392.410(7) of the Revised Statutes of Missouri ("HB 620"). The Missouri Municipals file this petition on behalf of more than 600 municipalities and 63 municipal electric utilities located throughout the State of Missouri.

HB 620 violates Section 253(a) of the Act because, with limited exceptions, it prohibits Missouri municipalities and municipal electric utilities from providing telecommunications services or making telecommunications infrastructure available to potential competitors of incumbent providers of telecommunications services. The Missouri legislature did not enact HB 620 to achieve any of the permissible public purposes set forth in Section 253(b) of the Act -- it simply succumbed to the vast lobbying effort that Southwestern Bell and other incumbents mounted to preserve their monopolies in local markets throughout the State. Section 253(d) therefore mandates that the Commission preempt HB 620.

OVERVIEW AND SUMMARY

As Chairman Kennard has observed, one of the main purposes of the Telecommunications Act is to eliminate all barriers that prevent consumers from choosing providers "from as wide a variety of providers as the market will bear."[1] Similarly, Senate Majority Leader Trent Lott has noted that the "primary objective" of the Telecommunications Act is to establish a "framework where everybody can compete everywhere in everything."[2] Judged by these standards, HB 620 is a thoroughly bad law. Unless the Commission preempts it, HB 620 will impede the development of effective local competition in Missouri for years. It will deny communities throughout the State a fair chance to obtain prompt and affordable access to the benefits of the Information Age. It will constrict economic growth, educational opportunity and quality of life, particularly in rural areas. It will thwart attainment of universal service goals of the Telecommunication Act by reducing both the number of potential service providers and the number of contributors to universal service support mechanisms. It will also disturb the competitive balance between public and private providers of electric power that has served Missouri well for decades.

The Missouri Municipals recognize that the Commission has declined to preempt a Texas law that prohibits municipalities and municipal electric utilities in Texas from engaging in telecommunications activities.[3] In that case, which was decided shortly before four of the five current commissioners took office, the prior Commission determined that the term "any entity" in Section 253(a) of the Act does not apply to municipalities that do not operate electric utilities.

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1 *Statement of William E. Kennard Before the Senate Subcommittee on Antitrust, Business Rights, and Competition* (March 4, 1998), Attachment A.

2 Statement of Senator Trent Lott (R-MS), June 7, 1995, Congressional Record at S.7906, Attachment B.

3 *In the Matter of the Public Utility Commission of Texas*, FCC 97-346, (rel. Oct. 1, 1997) ("*Texas Order*"), petition for review pending in *City of Abilene, TX, and the American Public Power Association v. Federal Communications Comm'n*, Case Nos. 97-1633 and 97-1634 (D.C. Cir.).

That ruling, however, did not address the major issues discussed here, did not consider several important new developments, and did not properly analyze congressional intent.

The Texas case involved four separate dockets, numerous complex issues in addition to the municipal-authority issue, an extraordinarily large number of parties, and a massive record. Shortly before the Commission issued its decision, ICG Telecom, Inc., which had sought preemption of the Texas law as applied to municipal electric utilities, withdrew its petition. In response, the Commission limited its decision to the facts presented in a separate petition by the City of Abilene, TX, which does not own or operate a municipal electric utility. Specifically, the Commission ruled that "we do not decide at this time whether section 253 bars the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility." *Texas Order*, ¶ 179. This proceeding squarely presents that issue.

Even as to municipalities that do not own or operate electric utilities, the *Texas Order* did not address the issues that the Commission had itself identified as the most important ones. According to the Commission, the key issue in determining whether the term "any entity" in Section 253(a) applies to municipalities is whether there is "some indication in the statute or its legislative history that Congress intended such a result." *Texas Order*, ¶ 187, *see also* ¶ 181. Yet, the Commission did not present any substantive analysis of the language, structure or legislative history of the Act. Nor did the Commission even mention the correspondence that it had received from prominent members of Congress confirming that the term "any entity" covered municipalities and municipal electric utilities.

Because much of the relevant legislative history of Section 253 pertains to municipal electric utilities, it is possible that the Commission believed that its decision to defer consideration of their status obviated the need for a thorough review of that history. Whatever the reason, the Commission's failure to perform the required analysis led it to overlook the compelling proof, discussed below, that Congress did, indeed, intend that Section 253 cover all municipalities, including those that do not operate electric utilities. The Commission would even have found

express statements to that effect in the Senate report discussing the preemption provision that ultimately became Section 253(a).

Several new developments reinforce the conclusion that the *Texas Order* was incorrect. First, the United States Court of Appeals for the District Columbia Circuit has recently issued two decisions that undermine the Commission's rationale in the *Texas Order*. In *Alarm Industry Communications Committee v. Federal Communications Comm'n*, 131 F.3d 1066, 1069-70 (D.C. Cir. 1997), the court struck down the Commission's narrow interpretation of the term "entity" in Section 275 of the Act, finding that "entity" is typically defined very broadly in common, non-technical dictionaries and that the Commission failed to interpret that term with due regard for the Act's underlying policies. The court also refused to afford the Commission's interpretation deference, finding that it "reflect[ed] no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, no application of expertise in telecommunications." *Id.* Similar considerations apply here.

Second, in *Bell Atlantic Telephone Companies v. Federal Communications Comm'n*, 131 F.3d 1044 (D.C. Cir. 1997), the court found that, in determining the "plain" meaning of a statute, the Commission must perform a thorough analysis that exhausts all of the traditional tools of statutory construction, including the language, structure, legislative history and purposes of the Act. *Id.* at 1047. The Commission cannot simply scan the Act and its legislative history in search of an "express" statement of legislative intent, as the Commission has recently admitted that it did in deciding the *Texas* case.[4]

The Commission has itself made numerous statements in recent months that are inconsistent with the *Texas Order*. For example, in one order, the Commission held that Congress's use of the term "any" in the Telecommunications Act deprives the Commission of

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[4] In a recent letter to Congress, Chairman William Kennard, who was general counsel of the Commission at the time that it issued the *Texas Order*, confirmed that the Commission had looked for an "express" statement of legislative intent (Attachment C hereto).

authority to make distinctions that Congress did not make, that municipalities that provide telecommunications services or cable television services are "entities" whose pole attachments must be counted in allocating costs of a pole, and that municipalities are "entities" that must be covered in the Commission's regulatory flexibility analyses. *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, *Report and Order*, FCC 98-20, ¶ 40 (rel. Feb. 6, 1998) ("*Pole Attachment Order*"). Similarly, in several recent orders, forms and reports, the Commission has treated municipalities and municipal electric utilities as "entities" that must make contributions to the Universal Service program if they, like privately-owned entities, provide "telecommunications service" or "interstate telecommunications."

Recent developments have also undermined the Commission's assumption that local competition would emerge in Texas even if municipalities were denied protection under Section 253. *Texas Opinion*, ¶ 187. As the Texas Public Utility Commission has just found, Southwestern Bell's uncooperative and obstructive conduct has prevented its competitors from capturing more than a "miniscule" number of business and residential customers in Texas. Transcript of Open Meeting, May 21, 1998, pp. 186-208 (Attachment D hereto). In fact, two of the three commissioners observed that meaningful competition will not emerge in Texas unless and until Southwestern Bell fundamentally changes its corporate culture from top to bottom. *Id.* It is unreasonable to suppose that Southwestern Bell will act any less anti-competitively in Missouri.

Furthermore, in ¶190 of the *Texas Order*, the Commission urged other states not to do what Texas had done because "[m]unicipal entry can bring significant benefits by making additional facilities available for the provision of competitive services." Unfortunately, the Commission's plea has gone unheeded. In fact, the Commission's determination that it lacks authority to prevent states from banning municipal telecommunications activities has emboldened incumbent monopolists in many states to redouble their efforts to secure anti-competitive state legislation that reinforces their existing market dominance. The Commission can deter such

efforts -- as Congress intended -- only by issuing clear, forceful and unequivocal orders preempting measures such as HB 620.

Finally, as the Commission recognized in the *Texas Order*, Congress gave it extraordinarily broad authority to preempt state and local barriers to entry:

> [S]ection 253 expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandate that "prohibit[s] or has the effect of prohibiting" a firm from providing any interstate or intrastate telecommunications service. *We believe that this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service*. As to this latter category of indirect, effective prohibitions, we consider whether they materially inhibit or limit the ability of *any competitor or potential competitor* to compete in a fair and balanced legal and regulatory environment.

Texas Order, ¶ 22 (emphasis added). Yet, even though it could not find even one word in the language or legislative history of the Act to support its position, the Commission attributed to Congress an intent to deny public entities the benefits of this broad mandate. Thus, the Commission essentially made policy for Congress – which the Commission had no authority to do. The Commission should now rescind that decision and enforce Section 253 as written.

ATTACHMENT E

EDWARD J. MARKEY
7TH DISTRICT, MASSACHUSETTS

COMMERCE COMMITTEE
RANKING MEMBER
SUBCOMMITTEE ON
TELECOMMUNICATIONS, TRADE
AND CONSUMER PROTECTION
BUDGET COMMITTEE
RESOURCES COMMITTEE
(on leave)
COMMISSION ON SECURITY AND
COOPERATION IN EUROPE

Congress of the United States
House of Representatives
Washington, DC 20515–2107

2108 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-2107
(202) 225-2836

DISTRICT OFFICES
[illegible] SUITE 101
MEDFORD, MA 02155
(781) 396-2900

188 CONCORD STREET, SUITE 102
FRAMINGHAM, MA 01702
(508) 875-2900

April 20, 1999

The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20024

Dear Chairman Kennard:

We are writing to express our concern about the growing trend toward enactment of state barriers to entry for municipal utilities in telecommunications. In our view, State barriers to entry for municipal utilities have the effect of shutting the door on an important participant in providing greater telecommunications competition and consumer choice.

Congress approved Section 253 during consideration of the Telecommunications Act of 1996 in order to enable "any entity", without qualification, to provide communications services. Moreover, the related conference committee report explains that "explicit prohibitions on entry by a utility into telecommunications are preempted under this section." A number of statutes at the State level would appear to thwart congressional intent to encourage utility involvement in the telecommunications industry.

In enacting the Telecommunications Act, Congress recognized that utility infrastructure would provide valuable new opportunities through which new market entrants could enter the telecommunications marketplace. In fact, this goal has already been realized in many cities across the country where the municipal utility has teamed up in partnership with a private company to provide communications services in their community.

The Commission now has pending before it a petition, filed by the municipally-owned utilities in the State of Missouri. This petition requests that the Commission fully implement Section 253 of the Act by preempting the restrictions imposed on the provision of communications services by municipal utilities in Missouri.

We strongly urge you to consider approving the Missouri municipals' petition for preemption consistent with Section 253 of the Act. We believe that doing so will allow municipal utilities to advance the pro-competitive and pro-consumer policies the Congress envisioned for such entities when it successfully legislated.

Thank you in advance for considering our views with respect to this matter. If you have any questions please do not hesitate to contact us.

Sincerely,

Joe Moakley
Member of Congress

Edward J. Markey
Member of Congress

Barney Frank
Member of Congress

ATTACHMENT F

RICK BOUCHER
9TH DISTRICT, VIRGINIA

COMMITTEES:

COMMERCE
SUBCOMMITTEES:
TELECOMMUNICATIONS, TRADE AND CONSUMER PROTECTION
ENERGY AND POWER

JUDICIARY
SUBCOMMITTEE:
COURTS AND INTELLECTUAL PROPERTY

ASSISTANT WHIP

Congress of the United States
House of Representatives

WASHINGTON OFFICE:
2329 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-4609
(202) 225-3861
e-mail: MINTHNET@MAIL.HOUSE.GOV
WWW: http://www.house.gov/boucher/

CONSTITUENT SERVICE OFFICES:
188 EAST MAIN STREET
ABINGDON, VIRGINIA 24210
(540) 628-1145

311 SHAWNEE AVENUE EAST
BIG STONE GAP, VIRGINIA 24219
(540) 523-0450

106 NORTH WASHINGTON AVENUE
P.O. BOX 1748
PULASKI, VIRGINIA 24301
(540) 980-4310

March 16, 1999

BRPA
RECEIVED
MAR 19 1999
Noted
Refer To S: BRPA Henrietta, ACTS Monticello, Dick, Nipper, Zoller
Filed (A) LEG/FED/KONG. COMM

The Honorable William Kennard
Chairman
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Kennard:

The Commission now has pending before it a petition concerning the ability of local government-owned utility services to provide telecommunications services. The petition, filed by municipally-owned utilities in Missouri (CC Docket No. 98-122), asks that the FCC take action under Section 253 of the Telecommunications Act of 1996 to empower them to offer these services. This case has national implications because of laws in other states (Texas, Arkansas, Tennessee, Nevada, Minnesota, and Virginia) which restrict municipal utility entry into the telecommunications market. I hope that the Commission will, in conformance with all applicable Commission Rules, swiftly approve the petition. In so doing, you will give effect to Section 253 of the Telecommunications Act of 1996.

State prohibitions on telecommunications activities by local governments conflict with the language and intent of Section 253 (a) of the Telecommunications Act of 1996 – which was designed to ensure that "*any entity*" can provide communication services in a newly competitive marketplace. In addition, the conference report accompanying the Act recognized the inclusiveness of the term "*any entity*" by stating that, "*nothing in this section shall affect the ability of a State to safeguard the rights of consumers...However explicit prohibitions on entry by a utility into telecommunications are preempted under this section.*"

In enacting the 1996 Act, Congress envisioned electric utilities, with their existing and soon-to-be constructed modern communications infrastructures, as key participants in the effort to facilitate competition in the telecommunications industry.

Approximately 75% of municipal power systems in the U.S. serve cities with populations of less than 10,000 residents. It is precisely in these smaller communities that the need for the innovative entity of new telecommunications competitors is the greatest due to the general absence of any alternative to the incumbent monopoly providers. Municipal utility entry will in many instances be the only competition available.

I urge you and your Commission colleagues to take immediate steps to eliminate barriers to telecommunications market entry for municipally-owned utilities in accordance with the intent and language of the Telecommunications Act of 1996. As always, I will appreciate your careful review of this matter. With kind regards and best wishes, I remain

Sincerely,

Rick

Rick Boucher
Member of Congress

RB/msr

cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani

ATTACHMENT G

United States Senate

WASHINGTON, DC 20510

March 26, 1999

The Honorable William Kennard
Chairman
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Dear Chairman Kennard:

The Federal Communications Commission (FCC) now has pending before it a very important petition regarding the ability of municipal utilities to provide telecommunications services. The petition, filed by municipally-owned utilities in Missouri (CC Docket No. 98-122) asks that the FCC take action under Section 253 of the Telecommunications Act of 1996. This case has national implications because of similar laws in other states (Texas, Arkansas, Tennessee, Nevada, Minnesota, and Virginia) which restrict municipal utility entry into the telecommunications market. In response to this petition, we ask that you take swift action to approve the petition for preemption, and thus bring to an end a growing anti-competitive trend toward the erection of state barriers to entry for municipal utilities.

State prohibitions on telecommunications activities by municipal utilities clearly conflict with the language and intent of Section 253 (a) of the Telecommunications Act of 1996--which was designed to ensure that "any entity" could provide communications services in a newly competitive marketplace. In addition, the conference report accompanying the Act recognized the inclusiveness of the term "any entity" by stating that, "nothing in this section shall affect the ability of a State to safeguard the rights of consumers...however, explicit prohibitions on entry by a utility into telecommunications are preempted under this section."

It is clear that in enacting the Telecommunications Act of 1996, Congress envisioned electric utilities, with their existing communications infrastructures, as key players in the effort to facilitate competition in the telecommunications industry. Their communications networks and facilities often provide an alternative source of access for the new entrants we depend upon to bring new services and increased competitiveness to the industry.

In addition, approximately 75% of municipal power systems in the U.S. serve cities with populations of less than 10,000 residents. These utilities, just as they brought electrical service to traditionally under-served areas of the country, are now prepared to bring new telecommunications services to their communities. Barring municipal utilities from utilizing their communications infrastructure to provide the telecommunications services will undermine the benefits of local control and unfairly restrict the availability of services and the development of competition in rural communities throughout the U.S.

In order for widespread competition to develop effectively in the telecommunications industry, we must preserve local control and decision-making, effectively utilize existing utility infrastructure, and ensure that all parts of the country and all customers can enjoy the benefits of advanced telecommunications technology. We urge you to take immediate steps to eliminate barriers to entry for municipal utilities in accordance with the vision, intent and language of the Telecommunications Act of 1996.

Sincerely,

J. Robert Kerrey

Paul Wellstone

Tom Harkin

John Kerry

Byron Dorgan

ATTACHMENT H

VIRGIL H. GOODE, JR.
5TH DISTRICT, VIRGINIA

Congress of the United States
House of Representatives
Washington, DC 20515–4605

February 12, 1999

The Honorable William Kennard
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554-0001

Dear Mr. Kennard,

The Federal Communications Commission (FCC) now has pending before it a very important petition regarding the ability of municipal utilities to provide telecommunications services. The petition, filed by municipally-owned utilities in Missouri (CC Docket No. 98-122) asks that the FCC take action under Section 253 of the Telecommunications Act of 1996. This case has national implications because of similar laws in other states (Texas, Arkansas, Tennessee, Nevada, Minnesota, and Virginia) which restrict municipal utility entry into the telecommunications market.

State prohibitions on telecommunications activities by municipal utilities clearly conflict with the language and intent of Section 253 (a) of the Telecommunications Act of 1996 — which was designed to ensure that "*any entity*" could provide communications services in a newly competitive marketplace.

Approximately 75% of municipal power systems in the U.S. serve cities with populations of less than 10,000 residents. These utilities, just as they brought electrical service to traditionally underserved areas of the country, are now prepared to bring new telecommunications services to their communities. Barring municipal utilities from utilizing their communications infrastructure to provide the telecommunications services will undermine the benefits of local control - and unfairly restrict the availability of services and the development of competition in rural communities throughout the U.S.

I ask that you show every consideration to approve the petition for preemption filed by the municipally-owned utilities in Missouri because of its impact in jurisdictions like Virginia. Thank you again for your consideration and with kind regards, I am

Sincerely yours,

Virgil H. Goode

bcc: Mr. Duane S. Dahlquist